No. 93-1543

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CHRISTINE McKENNON,
Petitioner,

v.

NASHVILLE BANNER PUBLISHING CO.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN CIVIL LIBERTIES UNION, AND THE AMERICAN ASSOCIATION OF RETIRED PERSONS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

MICHAEL A. COOPER
Co-Chair
NORMAN REDLICH, Trustee
BARBARA R. ARNWINE
THOMAS J. HENDERSON
RICHARD T. SEYMOUR
SHARON R. VINICK
Lawyers' Committee for
Civil Rights Under Law
1450 G Street, Suite 400
Washington, D.C. 20005
(202) 662-8600

CATHY VENTRELL-MONSEES
American Association of
Retired Persons
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-2060

WILLIAM F. SHEEHAN
(Counsel of record)
WILLIAM D. WEINREB
AMY HORTON
Shea & Gardner
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

STEVEN R. SHAPIRO
HELEN HERSHKOFF
SARA L. MANDELBAUM
American Civil Liberties
Union Foundation
132 West 43 Street
New York, N.Y. 10036
(212) 944-9800

Counsel for Amici Curiae

July 21, 1994

36 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. THE LOWER COURT ERRED IN RULING THAT PETITIONER WAS NOT INJURED BY THE VIOLATION OF HER ADEA RIGHTS 6

II. CONGRESS DID NOT INTEND FOR AFTER-ACQUIRED EVIDENCE OF EMPLOYEE MISCONDUCT TO DENY ALL RELIEF FOR VIOLATIONS OF THE FAIR EMPLOYMENT LAWS 10

A. The After-Acquired Evidence Rule Is Inconsistent With the Text of the Fair Employment Laws 10

B. The After-Acquired Evidence Rule Defeats the Deterrent and Compensatory Purposes of the Fair Employment Laws 12

C. The After-Acquired Evidence Rule Has Been Rejected Under Other Federal Statutory Schemes 17

1. Employment-related statutes 17

2. Common-law fault-based defenses 22

Page

III. AFTER-ACQUIRED EVIDENCE MAY AFFECT THE REMEDIES AVAILABLE IN PARTICULAR CASES 23

A. Backpay 26

B. Reinstatement and Front Pay 27

C. Compensatory Damages 29

D. Liquidated Damages 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

ABF Freight System, Inc. v. *NLRB*, ___ U.S. ___, 114 S. Ct. 843 (1994) 20

Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) ..... *passim*

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) 15

Anastasio v. *Schering Corp.*, 838 F.2d 701 (3d Cir. 1988) 26

Axelson, Inc., 285 N.L.R.B. 862 (1987) ... 20

Bartek v. *Urban Redevelop. Auth.*, 882 F.2d 739 (3d Cir. 1989) 26

Bateman Eichler, Hill Richards, Inc. v. *Berner*, 472 U.S. 299 (1985) 5, 22

Bigelow v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946) 27

Bonger v. *American Water Works*, 789 F. Supp. 1102 (D. Colo. 1992) 25

Carter v. *Sedgwick County, Kan.*, 929 F.2d 1501 (10th Cir. 1991) 28

Cooper v. *Federal Reserve Bank*, 467 U.S. 867 (1984) 6

Duffy v. *Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393 (3d Cir.), *cert. denied*, 469 U.S. 1087 (1984) 24

Duke v. *Uniroyal Inc.*, 928 F.2d 1413 (4th Cir.), *cert. denied*, 112 S. Ct. 429 (1991) 27, 28

Floca v. *Homcare Health Servs., Inc.*, 845 F.2d 108 (5th Cir. 1988) 28

Ford Motor Co. v. *EEOC*, 458 U.S. 219 (1982) 12, 13, 16

Franklin v. *Gwinnett County Public Schools*, 503 U.S. ___, 112 S. Ct. 1028 (1992) 29

Franks v. *Bowman Transp. Co.*, 424 U.S. 747 (1976) ..... *passim*

	Page
Gibson v. *Mohawk Rubber Co.*, 695 F.2d 1093 (8th Cir. 1982)	12, 26, 27
Ginsberg v. *Burlington Indus., Inc.*, 500 F. Supp. 696 (S.D.N.Y. 1980)	28
Goldberg v. *Bama Mfg. Corp.*, 302 F.2d 152 (5th Cir. 1962)	19
Gypsum Carrier, Inc. v. *Handelsman*, 307 F.2d 525 (9th Cir. 1962)	18
Harris v. *Forklift Systems, Inc.*, ___ U.S. ___, 114 S. Ct. 367 (1993)	29
Hawley v. *Dresser Indus., Inc.*, 958 F.2d 720 (6th Cir. 1992)	24
Hazen Paper Co. v. *Biggins*, 113 S. Ct. 1701 (1993)	7
Hill v. *Spiegel, Inc.*, 708 F.2d 233 (6th Cir. 1983)	26
Houghton v. *McDonnell Douglas Corp.*, 627 F.2d 858 (8th Cir. 1980)	28
International Bhd. of Teamsters v. *United States*, 431 U.S. 324 (1977)	12, 27
John Cuneo, Inc., 298 N.L.R.B. 856 (1990)	20
Lorillard v. *Pons*, 434 U.S. 575 (1978)	6, 19, 26
McDonald v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976)	11, 27
McDonnell Douglas v. *Green*, 411 U.S. 792 (1973)	25, 27
McKnight v. *General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991)	28
Meritor Savings Bank v. *Vinson*, 477 U.S. 57 (1986)	29
Milligan-Jensen v. *Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992), *cert. dismissed*, 114 S. Ct. 22 (1993)	3, 7
Minneapolis, St. P. & S. Ste. M. Ry. v. *Rock*, 279 U.S. 410 (1929)	18

	Page
Mt. Healthy City School District Board of Education v. *Doyle*, 429 U.S. 274 (1977)	4, 8, 9, 23
Newport News Shipbuilding & Dry Dock Co. v. *Hall*, 674 F.2d 248 (4th Cir. 1982)	18
Omar v. *Sea-Land Serv., Inc.*, 813 F.2d 986 (9th Cir. 1987)	18
Oscar Mayer & Co. v. *Evans*, 441 U.S. 750 (1979)	12
Perma Life Mufflers, Inc. v. *International Parts Corp.*, 392 U.S. 134 (1968)	5, 22
Price Waterhouse v. *Hopkins*, 490 U.S. 228 (1989)	4, 8
Rodriguez v. *Taylor*, 569 F.2d 1231 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978)	12, 15, 28
St. Mary's Honor Ctr. v. *Hicks*, 509 U.S. ___, 113 S. Ct. 835 (1993)	17, 20, 21
Stacey v. *Allied Stores Corp.*, 768 F. 2d 402 (D.C. Cir. 1985)	26
Still v. *Norfolk & W. Ry.*, 368 U.S. 35 (1961)	5, 17, 29
Summers v. *State Farm Mut. Auto Ins. Co.*, 864 F.2d 700 (10th Cir. 1988)	*passim*
Taylor v. *Teletype Corp.*, 648 F.2d 1129 (8th Cir.), *cert. denied*, 454 U.S. 969 (1981)	27
Trans World Airlines, Inc. v. *Thurston*, 469 U.S. 111 (1985)	6, 29, 30
United States v. *Burke*, 112 S. Ct. 1867 (1992)	24, 28
United States Postal Serv. Bd. of Governors v. *Aikens*, 460 U.S. 711 (1983)	6
Wallace v. *Dunn Constr. Co.*, 968 F.2d 1174 (11th Cir. 1992)	*passim*
Washington v. *Lake Country, Ill.*, 969 F.2d 250 (7th Cir. 1992)	7, 25
Welch v. *Liberty Machine Works*, 1994 U.S. App. LEXIS 10028, 23 F.3d 1403 (8th Cir. Jan. 13, 1994)	24, 25

Page

STATUTES:

Age Discrimination in Employment Act,
29 U.S.C. § 621 et seq. . . . . *passim*
§ 4(a), 29 U.S.C. § 623(a) 6
§ 7(b), 29 U.S.C. § 626(b) 11, 29
Civil Rights Act of 1991, adding
Rev. Stat. § 1977A, 42 U.S.C. § 1981a . . 29
Fair Labor Standards Act,
29 U.S.C. § 201 et seq. 11
Title VII of the 1964 Civil Rights Act,
42 U.S.C. § 2000e et seq. . . . . *passim*
§ 703(a), 42 U.S.C. § 2000e-(2)(a) 6
§ 703(j), 42 U.S.C. § 2000e-(2)(j) 24

OTHER AUTHORITIES:

Annual Report of the Director of the Administrative Office of the United States Courts *15*
Brunsman, Steve, *Resume Fraud, Lying Not at All Uncommon*, Houston Post, Sept. 26, 1992, at E2 15
Crider, Dale, *Resume Fraud Complicates Firing Claims*, Nat'l L.J., Dec. 7, 1992, at 17 . . . 15
EEOC: Revised Enforcement Guide on Recent Developments in Disparate Treatment Theory, Fair Empl. Prac. Man. (BNA) 405:6915 (1992) *passim*
Groner, Jonathan, *New Defense for Bias Suits: Attack*, Fulton County Daily Report, Mar. 12, 1993, at 1 14
Kelly, Dennis, *Lies Part of Students' Lives*, USA Today, Nov. 13, 1992, at 1 14
Labich, Kenneth, *The New Crisis in Business Ethics*, Fortune, Apr. 20, 1992, at 167 . . . 14

Page

Maddux, David A., & Douglas A. Barritt, *Employees' Lies Can Backfire: Misconduct May Bar Employment Suits*, Nat'l L.J., May 10, 1993, at 25 14
Many Falsify Credentials, Qualifications, Atlanta Constitution, May 11, 1992, at B5 14
Mesritz, George C., *"After-Acquired" Evidence of Pre-Employment Misrepresentations: An Effective Defense Against Wrongful Discharge Claims*, 18 Employee Rel. L.J. 215 (1992) 14
Rigdon, Joan E., *Deceptive Resumes Can Be Door-Openers But Can Become an Employee's Undoing*, Wall St. J., June 17, 1992, at B1 15
White, Rebecca H., & Robert D. Brussack, *The Proper Role of After-Acquired Evidence in Employment Discrimination Litigation*, 35 B.C. L. Rev. 49 (1993) 3
Witus, Morley, *Defense of Wrongful Discharge Suits Based on an Employee's Misrepresentations*, 69 Mich. B.J. 50 (1990) 14

INTEREST OF THE *AMICI CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law is a nonprofit organization that was established at the request of the President of the United States in 1963 to involve leading members of the bar throughout the country in the national effort to ensure civil rights to all Americans. The disposition of the case at bar, arising under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, will affect the availability of relief to victims of unlawful employment practices under other federal statutes, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and other antidiscrimination statutes. The Lawyers' Committee has represented, and has assisted other lawyers in representing, numerous plaintiffs in administrative proceedings and lawsuits under Title VII in the lower courts. See, *e.g.*, *Lewis* v. *Bloomsburg Mills, Inc.*, 773 F.2d 561 (4th Cir. 1985); *Payne* v. *Travenol Labs., Inc.*, 673 F.2d 798 (5th Cir. 1982).

The Lawyers' Committee has also represented parties and participated as *amicus curiae* in ADEA and Title VII cases before this Court. See, *e.g.*, *Gilmer* v. *Interstate/Johnson Lake Corp.*, ___ U.S. ___, 112 S. Ct. 1647 (1991); *Landgraf* v. *USI Film Prods.*, ___ U.S. ___, 114 S. Ct. 1483 (1994); *St. Mary's Honor Ctr.* v. *Hicks*, ___ U.S. ___, 113 S. Ct. 2742 (1993); *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989). The Committee appeared most recently as an *amicus* in *ABF Freight System, Inc.* v. *NLRB*, ___ U.S. ___, 114 S. Ct. 843 (1994), in which the petitioner contended that the "after-acquired evidence" rule established in cases arising under Title VII should curb the remedial powers of the NLRB.

---

[1] The parties' written consents to the filing of this brief are being filed today with the Clerk of the Court.

The Lawyers' Committee is interested in this case because the lower courts' misapplication of the after-acquired evidence rule is substantially harming the enforcement of Title VII as well as the ADEA, and is materially reducing the incentive of employers to eliminate discrimination.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving and enhancing the civil rights and civil liberties embodied in the Constitution and civil rights laws of this country. In particular, the ACLU has long been involved in the effort to eliminate racial discrimination from our society. The Women's Rights Project of the ACLU Foundation was established to work toward the elimination of gender-based discrimination under law. In pursuit of that goal, the ACLU has represented parties and participated as *amicus curiae* in numerous anti-discrimination cases before the Court, including, during the last ten years, *International Union, UAW* v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991) and *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244 (1991).

The American Association of Retired Persons ("AARP") is a nonprofit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. More than one-third of AARP's thirty-three million members are employed, most of whom are protected by the ADEA and Title VII of the Civil Rights Act of 1964. One of AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices, and policies towards work and retirement. In pursuit of this objective, AARP has participated as *amicus curiae* in numerous discrimination cases before this Court and the federal courts of appeals, and filed an *amicus* brief in support of the grant of certiorari in this case.

SUMMARY OF ARGUMENT

The question presented in this case is whether Congress intended the courts to provide a remedy for unlawful employment discrimination visited on employees who would not have been hired, or who would have been fired, for some legitimate reason unknown to the employer when it committed its discriminatory act but learned in time to be offered as a defense in the employee's suit. In the typical case the subsequently learned legitimate reason (or "after-acquired evidence") is that the employee obtained his or her job through some kind of deceit or, as here, has engaged in on-the-job misconduct warranting dismissal.[2] The role Congress intended after-acquired evidence to play in these cases must be found in the language and purposes of the ADEA. The court below, however, without mentioning either the text or any perceived policy of the Act, denied all relief on the theory that respondent's violation of the Act was not the legal cause of petitioner's injury.

The lower court's ruling springs from the Tenth Circuit's decision in *Summers* v. *State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700, 708 (10th Cir. 1988).[3] There the full extent of an employee's falsification of company records came to light only after he filed an ADEA and Title VII suit against his employer for dismissing him on the basis of religion and age. The Tenth Circuit wrote that, although the previously unknown falsifications "could not have been a

---

[2] See Rebecca H. White & Robert D. Brussack, *The Proper Role of After-Acquir.d Evidence in Employment Discrimination Litigation*, 35 B.C. L. Rev. 49, 50 nn.3-4, 57 & n.27 (1993) (collecting cases).

[3] The Sixth Circuit adopted *Summers* in *Johnson* v. *Honeywell Info. Sys., Inc.* 955 F.2d 409, 415 (6th Cir. 1992), and followed it in *Milligan-Jensen* v. *Michigan Technological Univ.*, 975 F.2d 302, 304 (6th Cir. 1992), *cert. dismissed*, 114 S.Ct. 22 (1993), and in the decision below. Pet. App. 5a-7a.

'cause' or 'reason' for [plaintiff's] discharge," it would be "utterly unrealistic" to ignore them and they should be "considered in determining what relief, or remedy, is available to [plaintiff]." 864 F.2d at 704, 708. The Tenth Circuit did not, however, undertake that consideration in light of the text or purposes of the fair employment laws. Instead it cited this Court's decision in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), for the proposition that, if a worker who had engaged in so-called resume fraud would not have been hired (or, in the case of on-the-job misconduct, would have been fired) had the true facts been known, then he or she suffers no legal injury from being discharged for discriminatory reasons.

The Tenth Circuit misread *Mt. Healthy*. That decision established that, when an employer bases an employment decision on both legitimate and illegitimate reasons, it can avoid liability if it can prove that it would have made the same decision based on the legitimate reason alone. As the Court made clear in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 252 (1989), however, the proffered legitimate reason must have actually motivated the employer at the time it took the disputed action.

In this case, as in all after-acquired evidence cases, the employer by definition was unaware of, and thus could not have been motivated by, the after-acquired legitimate reason at the time it committed its discriminatory acts. Hence the forbidden conduct alleged in the complaint and assumed by the courts below -- the denial of raises, harassment, and ultimate discharge of petitioner because of her age -- caused petitioner to suffer precisely the type of injury the Act was designed to redress: the deprivation of wage earning opportunities because of discrimination.

Accordingly, as the Eleventh Circuit recognized in *Wallace* v. *Dunn Constr. Co.*, 968 F.2d 1174 (11th Cir. 1992), the question the court below should have addressed is whether, despite the existence of a violation, Congress meant for victims of employment discrimination to be denied all relief automatically because of their own misconduct. The Eleventh Circuit correctly ruled that Congress could not have intended that result because, as a complete bar to relief, the after-acquired evidence rule hinders rather than advances the deterrent and compensatory purposes of the fair employment laws by allowing intentional discrimination to go without sanction, leaving victims worse off than if no violation had occurred, creating an inducement for employers to engage in reprehensible employment practices, and discouraging discrimination victims from enforcing their rights.

Our view is reinforced by many decisions, including *Still* v. *Norfolk & W. Ry.*, 368 U.S. 35 (1961), refusing to recognize after-acquired evidence of employee misconduct as a bar to all remedies under other statutes authorizing employment-related relief, and by *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299 (1985), and *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968), refusing to recognize common law fault-based defenses to violations of federal statutes Congress intended would be enforced by private actions.

Although after-acquired evidence cannot bar all relief, the proper application of the remedial principles embodied in the fair employment laws suggests that it may limit the availability of make-whole relief in particular cases. The victims of a discriminatory employment decision are not entitled to relief beyond the point when the same decision would have been made for nondiscriminatory reasons. Accordingly, after-acquired evidence of misconduct may serve in particular cases to terminate backpay and certain compensatory damages sooner than would otherwise be the

case, and to bar reinstatement and front pay entirely. It should not, however, affect the availability of punitive damages, which are awarded solely on the basis of the employer's understanding of the unlawfulness of his own conduct.

ARGUMENT

I. THE LOWER COURT ERRED IN RULING THAT PETITIONER WAS NOT INJURED BY THE VIOLATION OF HER ADEA RIGHTS

Section 4(a) of the ADEA, 29 U.S.C. § 623(a), together with § 703(a) of Title VII, 42 U.S.C. § 2000e-(2)(a), make it unlawful for an employer --

> to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's

age, race, religion, sex, or national origin. (Emphasis added).[4] As the words "because of" plainly indicate, the critical inquiry at the liability phase of an individual disparate treatment case "is the reason for a particular employment decision." *Cooper* v. *Federal Reserve Bank*, 467 U.S. 867, 8765 (1984). That presents a question of historical fact, requiring a determination of "what the state of a man's mind at a particular time is." *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 716 (1983) (internal quotation marks and citation omitted). If the employment

[4] As a rule, interpretations of Title VII apply with equal force to the ADEA, "for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII.'" *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985) (quoting *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978)).

decision at issue was made "because of" a prohibited factor, the statute has been violated, for "liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Hazen Paper Co.* v. *Biggins*, 113 S. Ct. 1701, 1706 (1993) (emphasis added).

Since by definition after-acquired evidence of misconduct is unknown to the employer at the time of the challenged employment decision, that evidence cannot possibly have been the reason for the decision. Hence it cannot bear on whether the employer has committed an unlawful employment practice. Indeed, none of the courts that has denied all relief on the basis of such evidence, including the courts below, appears to take a contrary view.[5]

Rather, these courts hold that after-acquired evidence mandates the denial of all relief notwithstanding the existence of a statutory violation on the theory that the violation was not the legal cause of the employee's injuries. In *Milligan-Jensen*, for example, the Sixth Circuit "regard[ed] the problem as one of causation" and adopted the view that, "if the plaintiff would not have been hired, or would have been fired, if the employer had known of the falsification [on her job application], the plaintiff suffered no legal damage by being fired." 975 F.2d at 304-5. And in the instant case the Sixth Circuit wrote that, "because it was undisputed that

[5] The courts below ruled as they did on the assumption that petitioner was "subjected to age discrimination." Pet. App. 13a, 3a. See also *Milligan-Jensen* v. *Michigan Technological Univ.*, 975 F.2d 302, 305 (6th Cir. 1992) (whether plaintiff was discriminated against was "irrelevant"); *Summers* v. *State Farm Mut. Auto. Inc. Co.*, 864 F.2d 700, 708 (10th Cir. 1988) ("[W]hile such after-acquired evidence cannot be said to have been a 'cause' for [plaintiff's] discharge in 1982, it is relevant to [his] claim of 'injury,' and does itself preclude the grant of any present relief or remedy."); *Washington* v. *Lake County, Ill.*, 969 F.2d 250, 255 (7th Cir. 1992) ("[The defendant] allows us to assume that it discriminated against [plaintiff] because of his race.").

[petitioner] was guilty of misconduct, prior to her discharge, that would, if known by [respondent], have caused her discharge * * * [petitioner] did not suffer injury from the claimed violation" of her ADEA rights. Pet. App. 3a. By this the court presumably meant that, because petitioner would have been discharged lawfully had her misconduct been known, the unlawful discharge was not the legal cause of her injuries.

The lower court's causation theory was first articulated by the Tenth Circuit in *Summers*, which mistakenly found it warranted by this Court's decision in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977).[6] In *Mt. Healthy* the Court held that an employer who bases an employment decision on a mixture of legitimate and illegitimate motives can avoid liability by showing "that it would have reached the same decision" based on the legitimate reasons alone. 429 U.S. at 287. In *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), the Court adopted the same test of liability in mixed-motive cases arising under Title VII, but in so doing firmly rejected the idea that an employer can prevail by offering a legitimate reason for its decision that it did not discover until later. As Justice Brennan explained for the plurality:

> An employer may not * * * prevail in a mixed-motive case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. * * * The very premise of a mixed motive case is that a legitimate reason was present * * *.

Id. at 252. See also *id.* at 260-61 (White, J., concurring in the judgment); *id.* at 266-67 (O'Connor, J., concurring in the

---

[6] See *Summers*, 864 F.2d at 705-06, 707 n.3 (describing *Mt. Healthy* as "the linchpin case" in this area).

judgment).

Accordingly, mixed-motive cases are no help to employers in after-acquired evidence cases, in which it is always undisputed that the legitimate reason offered for the employer's action was not known to the employer at the time of, and hence could not actually have motivated, that action. It follows that, in this case, the after-acquired legitimate reason for petitioner's discharge cannot alter the conclusion that age discrimination caused her to lose the wages she would have earned in the absence of respondent's violation of the Act. The loss of those wages is precisely the kind of injury that the fair employment laws were designed to redress.

Apart from its reliance on *Summers*, the lower court offered no explanation for its unorthodox theory of causation. In particular, it made no attempt to explain how its concept of causation would promote or even be consistent with the purposes of the ADEA. The court's aim was not to implement the congressional directive that the employee be made no worse off as a result of discrimination, see *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975) (quoting 118 Cong. Rec. 7168 (1972); *cf. Mt. Healthy*, 429 U.S. at 285-86, but rather to apply the general equitable principle that a plaintiff be made no better off as a result of his or her own misconduct. In the end its conclusion reflected not so much a rule of causation as a policy decision preferring one wrongdoer over another.[7]

---

[7] Strictly speaking, the lower court's causation theory would relieve employers of liability whenever any legitimate reason for firing or not hiring the employee, including reasons having nothing to do with employee misconduct, surfaced after the employer's discriminatory act -- such as the discovery that the employer had mistakenly given the employee a passing grade on the job application test, or that over time, unbeknownst to all, the employee's eyesight had deteriorated below standards required by the job. As petitioner demonstrates in her brief,

Our quarrel with the lower court's approach is not that it gives weight to the employee's misconduct, but that it gives it exclusive weight. Instead of treating the misconduct as a factor to be considered in shaping an equitable remedy consistent with the statutory purposes, it treats it as a basis for denying causation and therefore liability. That approach disregards altogether that discriminatory employment actions have occurred which caused, in any ordinary sense, economic loss to the employee -- the very situation Congress sought to redress. The better approach would have been to acknowledge that the employer committed violations that ordinarily would call for complete relief and then consider whether Congress intended a different result on account of the after-acquired evidence of employee misconduct. We turn now to that question.

II. CONGRESS DID NOT INTEND FOR AFTER-ACQUIRED EVIDENCE OF EMPLOYEE MISCONDUCT TO DENY ALL RELIEF FOR VIOLATIONS OF THE FAIR EMPLOYMENT LAWS

A. The After-Acquired Evidence Rule Is Inconsistent With The Text of The Fair Employment Laws

The lower court's ruling effectively excludes numerous employees from the coverage of the fair employment laws. It deems these workers incapable of suffering injury on account of unlawful discrimination regardless of the nature of the discrimination or its consequences for the workers and for society. In this case, for example, the court held that, because petitioner copied confidential records, she did not suffer a redressable injury even assuming the truth of her

---

the limitless sweep of that rule of causation would eviscerate the fair employment laws and we do not read the Sixth Circuit to have adopted it. Rather, along with other lower courts, the Sixth Circuit's rule seems rooted in notions of morality as well as causation, and hence restricted to cases of after-acquired evidence of employee misconduct.

allegations that respondent denied her raises, harassed her, and ultimately dismissed her on the basis of age.

Nothing in the language of the fair employment laws suggests that Congress meant to exclude from their protection workers who have obtained their jobs through some kind of deceit or retained them despite having engaged in some form of misconduct unknown to the employer. The liability provisions of those statutes make it unlawful to discriminate against "any individual" on the basis of prohibited factors. This Court has given these words their ordinary, everyday meaning, holding that Title VII makes no "exception for any group of particular employees." *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 (1976).

The remedial provisions of the fair employment laws likewise contain no suggestion that Congress meant to deny a remedy to workers who conceal disqualifying characteristics. Once a violation of the Act is established, "[a]mounts owing * * * as a result," such as back wages and benefits, are to be treated as "unpaid minimum wages or unpaid overtime compensation" under the Fair Labor Standards Act ("FLSA"). 29 U.S.C. § 626(b). If the violation is willful, the plaintiff is entitled to an additional equal amount as liquidated damages. *Id.*, incorporating by reference 29 U.S.C. § 216(b). In addition, ADEA courts are authorized to

> grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts

> deemed to be unpaid minimum wages or unpaid overtime compensation under this section. *Id.*

Although this language accords district courts a measure of discretion, Congress granted that discretion "to allow the most complete achievement of the objectives of [the statute] that is attainable under the facts and circumstances of the particular case." *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 770-71 (1976) (Title VII). Hence in fashioning a remedy "a court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 233 (1982) (internal quotations omitted) (Title VII); *Albemarle Paper*, 422 U.S. at 421 (discretionary power to award backpay granted "to make possible the fashioning of the most complete relief possible")(internal quotes and brackets omitted) (Title VII).

B. The After-Acquired Evidence Rule Defeats the Deterrent and Compensatory Purposes of the Fair Employment Laws

The ultimate objective of both the ADEA and Title VII is the eradication of discrimination in the workplace. *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979) (ADEA); *Rodriguez* v. *Taylor*, 569 F.2d 1231, 1236 (3d Cir. 1977) (ADEA); see also *Albemarle Paper*, 422 U.S. at 415. Both statutes seek to achieve that goal through policies of deterrence and restoration.[8] Make-whole relief (such as backpay) is essential to both policies. As this Court observed

---

[8] See *Albemarle Paper Co.*, 422 U.S. at 417; *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 364 (1977) (Title VII); *Gibson* v. *Mohawk Rubber Co.*, 695 F.2d 1093, 1097 (8th Cir. 1982) (ADEA seeks "to make persons whole for injuries suffered as a result of unlawful employment discrimination").

in *Albemarle Paper*, "[i]t is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges'" of their discriminatory practices. 422 U.S. at 418-419 (citation omitted). And in *Ford Motor Co.* this Court said that forcing an employer who has broken the law to pay the wages and benefits lost by the victim of his discrimination gives him a powerful incentive to avoid future violations, for "paying backpay damages is like paying an extra worker who never came to work." 458 U.S. at 229. These decisions recognize that the deterrent and make-whole purposes of the fair employment laws are mutually reinforcing, and that compensating victims of discrimination is critical to both, "for requiring payment of wrongfully withheld wages deters further wrongdoing at the same time that their restitution to the victim helps make him whole." *Franks*, 424 U.S. at 786 (Powell, J., concurring and dissenting).

The rule adopted by the court below, insulating lawless employers from the Act's remedial scheme, hinders rather than advances the restorative and deterrent policies of the ADEA and Title VII. The compensation-denying result of the rule is most immediately obvious, but its adverse effect on deterrence is no less severe. As the Eleventh Circuit observed in *Wallace* v. *Dunn Constr. Co.*, 968 F.2d 1174, 1180 (11th Cir. 1992), the after-acquired evidence rule

> does not encourage employers to eliminate discrimination. Rather, it invites employers to establish ludicrously low thresholds for 'legitimate' termination and to devote fewer resources to preventing discrimination because [the rule] gives them the option to escape all liability by rummaging through an unlawfully-discharged employee's background for flaws and

then manufacturing a 'legitimate' reason for the discharge that fits the flaws in the employee's background.

The concerns expressed by the *Wallace* court are not fanciful. Employers, human resource professionals, and their attorneys are by now fully informed of the potential for the use of after-acquired evidence to avoid liability for discrimination.[9] Moreover, employers have reason to believe that an intensive investigation of an ex-employee's job application may well reveal some misstatement of fact, even in the case of employees who have performed satisfactorily since their hire.[10]

---

[9] See, *e.g.*, Jonathan Groner, *New Defense for Bias Suits: Attack*, Fulton County Daily Report [for local attorneys], Mar. 12, 1993, at 1 (The doctrine of after-acquired evidence "permits [an employer] to trump discrimination charges by using dirt about an employee dug up after his termination"); George D. Mesritz, *"After-Acquired" Evidence of Pre-Employment Misrepresentations: An Effective Defense Against Wrongful Discharge Claims*, 18 Employee Rel. L.J. 215, 224 (1992) (instructing employers to subpoena the ex-employee's physicians and mental health care professionals for evidence of illicit drug use, and to contact courts located where the employee has resided); David A. Maddux & Douglas A. Barritt, *Employees' Lies Can Backfire: Misconduct May Bar Employment Suits*, Nat'l L.J., May 10, 1993, at 25, 29 ("[T]he employer * * * should leave no stone unturned in trying to identify any misrepresentations or misconduct by the employee."); Morley Witus, *Defense of Wrongful Discharge Suits Based on an Employee's Misrepresentations*, 69 Mich. B.J. 50, 51 (1990) ("In defending discrimination and retaliation claims, again the focus should not be on the employer's motive for discharging the employee.").

[10] See, *e.g.*, *Many Falsify Credentials, Qualifications*, Atlanta Constitution, May 11, 1992, at B5 ("resume fraud is rampant among job seekers"); Kenneth Labich, *The New Crisis in Business Ethics*, Fortune, April 20, 1992, at 167, 176 (surveys of Americans between 18 and 30 years old show that "between 12% and 24% say they included false information on their resumes"); Dennis Kelly, *Lies Part of Students' Lives*, USA Today, Nov. 13, 1992, at 1 (33% of high school and college students surveyed

The lower court's rule also impedes the deterrent aims of the fair employment laws by discouraging actions by private litigants, whom Congress has cast in the role of private attorneys general.[11] The after-acquired evidence rule invites employers to conduct a wide-ranging and potentially humiliating investigation into the personal and professional background of every claimant. The inevitable result will be that employees who would otherwise challenge unlawful employment practices may tolerate them instead. That is especially true of employees who are aware of a blemish on their records that could surface during discovery, but even employees with nothing to hide might reasonably

---

indicated that they are willing to lie on a resume); Steve Brunsman, *Resume Fraud, Lying Not at All Uncommon*, Houston Post, Sept. 26, 1992, at E2; Joan E. Rigdon, *Deceptive Resumes Can Be Door-Openers But Can Become an Employee's Undoing*, Wall St. J., June 17, 1992, at B1; Dale Crider, *Resume Fraud Complicates Firing Claims*, Nat'l L.J., Dec. 7, 1992, at 17 ("In today's employment market, resume fraud is an increasingly serious problem. * * * One in 10 employers reportedly has discovered applicants lying on resumes, and a close examination undoubtedly would uncover many more instances of applicants misrepresenting their qualifications.").

[11] In *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974), the Court said that "the private right of action remains an essential means of obtaining judicial enforcement of Title VII" and "the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices." The same is true under the ADEA. *Rodriguez* v. *Taylor*, 569 F.2d at 1245 (granting attorney's fees to ADEA plaintiff and noting that "congressionally approved awards are designed to encourage private enforcement of individual rights and to deter socially harmful conduct").

The Director of the Administrative Office of the U.S. Courts has reported that a total of 10,771 private fair employment lawsuits were filed in FY 1992, compared with only 440 filed by government enforcement agencies. Annual Report of the Director of the Administrative Office of the United States Courts, Table C2, Appendix I, at 179 (Sept. 30, 1992).

decide to abide unlawful practices rather than subject themselves to intrusive personal investigations. The end result will harm not only the employees in question but also their colleagues in the workplace, who benefit each time an employee vindicates the public policy against employment discrimination.

Finally, the rule adopted below, legitimatizing the employer's resort to discovery into the employee's background, will further snarl the litigation process and shift the focus from issues important under the fair employment laws to collateral matters. This Court has already deplored the slow pace of Title VII lawsuits, in which delays "are now commonplace, forcing the victims of discrimination to suffer years of underemployment or unemployment before they can obtain a court order awarding them the jobs unlawfully denied them." *Ford Motor Co.*, 458 U.S. at 228. The court of appeals' rule will make matters worse. Both prospective plaintiffs and their attorneys, who frequently handle discrimination claims on a contingency basis, will be discouraged from running the litigation gantlet, and as enforcement efforts are weakened so is the overall deterrent force of the Act. The adverse impact on deterrence is bound to increase as more violations of the Act go unpunished, and the proliferation of cases in which employers offer after-acquired evidence to avoid paying for their discriminatory actions shows that the court of appeals' rule may in fact immunize outlaw employers in a significant number of cases.

In sum, the after-acquired evidence rule finds no support in either the text or the policies of the fair employment laws. It wrongly insulates discriminatory employers from responsibility and thereby diminishes their "incentive to shun practices of dubious legality," *Albemarle Paper*, 422 U.S. at 417; it leaves victims of intentional discrimination uncompensated; it will chill private enforcement actions; it will encourage reprehensible conduct

by employers; and it will contribute to litigation complexity and delay. By contrast, what can be said on behalf of the after-acquired evidence rule -- that it punishes employees who have gained their jobs through deceit or retained them despite undiscovered on-the-job misconduct -- is irrelevant to the ADEA and Title VII. Those laws were not enacted to adjust employer-employee relationships in accord with all of the rights and duties that may flow between them. *Cf. St. Mary's Honor Center* v. *Hicks*, 509 U.S. ___, ___, 113 S.Ct. 2742, 2754 (1993) ("Title VII is not a cause of action for perjury; we have other civil and criminal remedies for that.").

C. The After-Acquired Evidence Rule Has Been Rejected Under Other Federal Statutory Schemes

Two lines of decisions, one dealing particularly with laws that require employers to compensate workers for employment-related injuries and the other broadly defining the role of fault-based defenses to federal statutory causes of action, have concluded that achievement of Congress's will takes priority over competing policies based on the plaintiff's misconduct.

1. Employment-related statutes. The after-acquired evidence of misconduct issue has arisen under a variety of federal statutes governing employer-employee relations, and over the years the courts and agencies responsible for implementing those statutes have devised rules for handling that issue in light of the statutory policies at stake. The general rule to have emerged is that after-acquired evidence cannot bar a claim altogether but may limit the availability of particular forms of relief.

In *Still* v. *Norfolk & W. Ry.*, 368 U.S. 35 (1961), this Court held that a railroad cannot escape its obligation under the Federal Employers' Liability Act to pay damages for personal injuries negligently inflicted upon a worker by

proving that the injured worker had obtained his job by making material misrepresentations on which the railroad relied in hiring him. The Court thereby effectively overruled *Minneapolis, St. P. & S. Ste. M. Ry.* v. *Rock*, 279 U.S. 410 (1929), which had denied such relief on public policy grounds to an injured worker who obtained employment through means that struck the Court as particularly outrageous.[12] The Court wrote in *Still* that "considerations of public policy of the general kind relied upon by the Court in *Rock* cannot be permitted to encroach further upon the special policy expressed by Congress in the Act," which is that workers be compensated for their injuries. *Id.* at 44-45. Hence, "the status of employees who become such through other kinds of fraud * * * must be recognized for purposes of suits under the Act." *Id.* at 45. The Court noted, however, that application fraud might serve to limit relief in appropriate cases, such as where the employee concealed evidence of a pre-existing injury for which he later sought compensation from the railroad. *Id.* at 46 n.14.[13]

[12] The plaintiff in *Rock* obtained his job after being rejected for health reasons by reapplying under a false name and enlisting a stand-in for the medical exam. Although *Still* did not overrule *Rock* in so many words, it held that "*Rock* must be limited to its precise facts" and suggested that those facts "may never arise again." 368 U.S. at 44.

[13] The lower federal courts have reached the same conclusion regarding after-acquired evidence of misconduct in cases arising under the Jones Act and the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"). See *Newport News Shipbuilding & Dry Dock Co.* v. *Hall*, 674 F.2d 248, 252 (4th Cir. 1982) (holding that the "specific legislative policy favoring compensation of injured employees" embodied in the LHWCA "overrides the general considerations surrounding an allegedly fraudulent formation of the employment relationship"); *Omar* v. *Sea-Land Serv., Inc.*, 813 F.2d 986, 990 (9th Cir. 1987) (Jones Act); *Gypsum Carrier, Inc.* v. *Handelsman*, 307 F.2d 525, 530-31 (9th Cir. 1962) (same).

In *Goldberg* v. *Bama Manufacturing Corp.*, 302 F.2d 152 (5th Cir. 1962), decided under the FLSA, an employee discharged for having reported wage and hour violations was discovered to have engaged in serious job-related misconduct, including forgery of production slips, theft, and time clock abuses.[14] The Department of Labor, charged with administering the statute, argued that reinstatement and backpay were nonetheless appropriate. The court viewed the case as presenting "a collision of two strong policies, one against condoning violations of the Act and the other against forcing an employer to keep unfit employees." *Id.* at 156. It reasoned that the congressional goal of eliminating violations would be frustrated by a rule mandating the denial of all relief, since "[t]he purposes of the [FLSA] require that employees throughout the country feel confident that they may bring a complaint to the Department of Labor without being penalized by their employers," and denying all relief would necessarily leave other workers with the impression that the employer "discharged an employee in violation of the Act and the district court allowed the employer to get away with it scot free." *Id.* Yet the court also acknowledged "half a dozen reasons why [the plaintiff] should have been discharged." *Id.* at 154. It concluded that "the conflicting policies present in this case would best be balanced" by an award requiring reimbursement but denying reinstatement. *Id.* at 156.

The National Labor Relations Board has similarly concluded that the national labor policy is best served by a rule allowing after-acquired evidence of employee

[14] The *Goldberg* decision is particularly significant because it was part of the body of case law interpreting the FLSA's remedial provisions that existed when Congress was drafting the ADEA. This Court has acknowledged that Congress was aware of those judicial interpretations and meant to incorporate them into the ADEA. *Lorillard* v. *Pons*, 434 U.S. at 580-81.

misconduct to limit relief but not bar it entirely. In *Axelson, Inc.*, 285 N.L.R.B. 862 (1987), two strikers who were unlawfully deprived of their jobs had previously engaged in strike misconduct which, if known by their employer, would have resulted in their lawful discharge. Seeking to "balance [its] responsibility to remedy unfair labor practices and [its] policy of discouraging strike misconduct," the Board denied reinstatement but awarded backpay up until the date the employer acquired knowledge of the misconduct (and would legitimately have discharged the workers). *Id.* at 866 & n.11. Similarly, in *John Cuneo, Inc.*, 298 N.L.R.B. 856 (1990), the Board considered the case of a worker who would not have been hired but for a material falsification on his resume, but who, absent discrimination, would have remained employed until the falsification was discovered. Once again seeking to "balance [its] responsibility to remedy the [employer's] unfair labor practice against the public interest in not condoning [the worker's] falsification of his employment application," the Board denied reinstatement but ordered backpay up until the date that the falsification was discovered. *Id.* at 856.

This Court's recent ruling in *ABF Freight System, Inc.* v. *NLRB*, ___ U.S. ___, 114 S. Ct. 835 (1994), suggests that it would uphold these Board decisions. There the Court upheld the Board's grant of reinstatement and back pay relief to a union supporter who had been fired because of anti-union animus but who had lied to his employer and had perjured himself in the Board's administrative proceedings. The Court rejected a rule barring all individual relief where employee misconduct or perjury had occurred, citing *St. Mary's Honor Ctr.*, 113 S.Ct. at 2754, as supporting the Board's decision to rely on "'other civil and criminal remedies' for false testimony, rather than a categorical exception to the familiar remedy of reinstatement." 114 S. Ct. at 840.

The Court's discussion of the policies at stake in that case applies equally to cases brought under the ADEA and Title VII.[15] It ruled that the Board had not abused its discretion in awarding relief because (1) the Board was under no obligation to adopt a rigid rule foreclosing relief in all such cases; (2) it could not "fault the Board's conclusion[] that [the employee's misconduct] was ultimately irrelevant to whether antiunion animus actually motivated his discharge"; and (3) it could not fault the Board's conclusion that "ordering effective relief in a case of this character promotes a vital public interest"; and (4) a rule denying all relief because of employee misconduct "might force the Board to divert its attention from its primary mission and devote unnecessary time and energy to resolving collateral disputes about credibility." *Id.*

Finally, the EEOC has determined that the national goal of equal employment opportunity would best be served by a rule that after-acquired evidence of misconduct cannot bar relief entirely but may limit the availability of particular remedies. Under the EEOC's Revised Enforcement Guide, an employer may be shielded from an order of reinstatement and from backpay accruing after the discovery of the legitimate reason for discharge. The employer is still subject, however, to awards of backpay and compensatory damages covering the period of time up to the discovery of the misconduct, as well as punitive damages. *EEOC: Revised Enforcement Guide on Recent Developments in Disparate*

---

[15] *Albemarle Paper* held that Title VII's "backpay provision was expressly modeled on the backpay provisions of the National Labor Relations Act" and that Congress intended the courts to follow the Board's practices in making backpay awards. 422 U.S. at 419-20 and 422 N.16.

Treatment Theory, Fair Empl. Prac. Man. (BNA) 405:6915, 6926-27 (1992) ("EEOC Revised Enforcement Guide").

2. Common-law fault-based defenses. The second line of relevant cases includes *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 138 (1968), in which the Court refused to apply the common law doctrine of *in pari delicto* as a defense to actions under the antitrust laws, overruling the circuit court's holding that the plaintiffs were barred from recovery because they had participated in the very antitrust violations for which they sought redress. The Court noted that "[t]here is nothing in the language of the antitrust acts which indicates that Congress wanted to make the common-law *in pari delicto* doctrine a defense to [private] actions" and that "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating" a violation. *Id.* at 138, 139. In the end it did not matter that the plaintiffs "may be subject to some criticism for having taken any part in [defendants'] allegedly illegal scheme and for eagerly seeking" more profits, *id.* at 139-40, for the importance of private enforcement of the antitrust laws carried the day.

The Court reached the same result on similar reasoning under the securities laws in *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299, 307 (1985). It stressed the importance of private actions in the enforcement of those laws and noted that it has "emphasized 'the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes.'" *Id.* at 307 (quoting *Perma Life*). It held that denying the *in pari delicto* defense would best serve the purposes of the federal securities laws because barring private actions "would inexorably result in a number of alleged fraudulent practices going undetected by the authorities and unremedied." *Id.* at 315.

Those decisions preclude the recognition of a fault-based defense here, for private enforcement actions under the ADEA and Title VII are essential to their enforcement. See note 12, *supra*. Moreover, if plaintiffs who have violated the very statutes they sue to enforce are not barred by their misconduct, then *a fortiori* plaintiffs who seek to vindicate federal statutes they have not violated cannot be turned away on supposed public policy grounds of punishing wrongdoers.

In sum, these two lines of decisions demonstrate that the proper approach to after-acquired misconduct evidence in discrimination cases is one that forthrightly seeks to accommodate the competing policy concerns. Where the policies expressed in a federal statute run up against countervailing public policies, the courts should fashion a remedy that "protects against the invasion of [federal] rights without commanding undesirable consequences not necessary to the assurance of those rights." *Mt. Healthy*, 429 U.S. at 287. The lower courts' theory of causation/legal injury frustrates this goal by forcing a choice between a complete remedy or no remedy at all. Faced with this artificial choice, it is small wonder that most courts have opted to leave the plaintiff empty-handed.

III. After-Acquired Evidence May Affect The Remedies Available In Particular Cases

We have shown that denying all relief to victims of unlawful discrimination on the basis of after-acquired evidence is inconsistent with the language and purposes of the fair employment laws. In this part we discuss the proper effect of after-acquired evidence on the four types of relief requested by petitioner in her complaint: (1) backpay for the wages and benefits she lost as a result of her wrongful dismissal and discriminatory denial of raises while she was employed; (2) reinstatement and front pay; (3) compensatory damages for the humiliation and embarrassment she suffered

as a result of age harassment, and (4) liquidated or punitive damages. We show that, although after-acquired evidence should never affect the availability of liquidated damages, in particular cases it may serve to terminate backpay and certain compensatory damages sooner than would otherwise be required and to preclude reinstatement and front pay entirely. Permitting after-acquired evidence to play a role in the formulation of a remedy is consistent with the statutory goal of placing discrimination victims, as near as may be, in the position they would have occupied had the discrimination not occurred. *United States* v. *Burke*, 112 S.Ct. 1867, 1873 (1992) (Title VII); *Albemarle Paper*, 422 U.S. at 418; *Hawley* v. *Dresser Indus., Inc.*, 958 F.2d 720, 725 (6th Cir. 1992) (ADEA); *Duffy* v. *Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1398 (3d Cir. 1984) (same). Such evidence may demonstrate that an unlawfully discharged worker who files a discrimination action would have been discharged lawfully prior to the date of final judgment in that action even in the absence of discrimination. Under these circumstances, reinstating the plaintiff and awarding full backpay would disserve the purposes of the fair employment laws by making the plaintiff better off than if no discrimination had occurred. See *Wallace*, 968 F.2d at 1182; cf. 42 U.S.C. § 2000e-(2)(j).

Allowing the use of after-acquired evidence to limit relief creates an obvious incentive for defendants to claim that any previously undisclosed resume falsification or workplace-rule infraction would have resulted in the plaintiff's dismissal had it been known. To guard against the possibility of abuse, a defendant should be required to prove its claim by objective evidence, such as a preexisting written policy stating that the conduct in question will result in immediate dismissal. See *Welch* v. *Liberty Machine Works*, 1994 U.S. App. LEXIS 10028, at *8, 23 F.3d 1403 (8th Cir. Jan. 13, 1994) (reversing summary judgment for employer because "self-serving affidavit" did not meet the "substantial

burden of establishing that the policy predated the hiring and firing of the employee"); *cf.* EEOC Revised Enforcement Guide, *supra*, at 405:6925 (employer must offer "objective evidence" of a "legitimate reason for the action" in mixed motive cases).

In addition, the defendant should be required to prove that its policy mandating dismissal is actually applied on a nondiscriminatory basis to others who engage in the same or similar conduct. *See Franks*, 424 U.S. at 772-73 & n.32;[16] *McDonnell Douglas* v. *Green*, 411 U.S. 792, 804 (1973) (evidence that employer had retained other employees who engaged in same conduct is "especially relevant" to showing pretextual nature of employer's stated reason for discharge). Finally, the court should bear in mind that proof that an employee would not have been hired is not proof that the employee would have been fired, for "[t]here are many situations • • • in which an employer would not discharge an employee if it subsequently discovered resume fraud, although the employee would not have been hired absent that resume fraud." *Bonger* v. *American Water Works*, 789 F. Supp. 1102, 1106 (D. Colo. 1992). *Accord Washington* v. *Lake County, Ill.*, 969 F.2d at 254.

With the foregoing in mind, we turn now to the different forms of relief requested by petitioner.

---

[16] In *Franks* the Court held that an employer could avoid providing make-whole relief to applicants who were discriminatorily denied consideration for line driver positions by showing that the individuals in question would not have been hired on the basis of "nondiscriminatory standards actually applied by Bowman to individuals who were in fact hired." 424 U.S. at 733 n.32 (emphasis added).

A. Backpay. A worker who has been discharged discriminatorily is normally entitled to backpay from the date of discharge to the date of final judgment. See *Lorillard* v. *Pons*, 434 U.S. at 584; *Franks*, 424 U.S. at 786 (Powell, J., concurring and dissenting); *Anastasio* v. *Schering Corp.*, 838 F.2d 701, 708 (3d Cir. 1988). However, "[c]onsistent with the ADEA's purpose of recreating the circumstances that would have existed but for the illegal discrimination, aggrieved persons are not entitled to recover damages for the period beyond which they would have been terminated for a nondiscriminatory reason." *Gibson*, 695 F.2d at 1097. *Accord Stacey* v. *Allied Stores Corp.*, 768 F.2d 402, 408 (D.C. Cir. 1985); *Hill* v. *Spiegel, Inc.*, 708 F.2d 233, 238 (6th Cir. 1983). Thus, for example, an employee is not entitled to backpay beyond the period when his or her job would have been eliminated because of plant closure, see *Gibson*, 695 F.2d at 1097, or a company reorganization, see *Bartek* v. *Urban Redevelop. Auth.*, 882 F.2d 739, 747 (3d Cir. 1989).

It follows that the victim of a discriminatory dismissal should not receive full backpay if the employer can prove that, even absent the discrimination, it would have discovered a legitimate reason for dismissal prior to the date of final judgment and would have dismissed the plaintiff on that basis alone. Back pay should be awarded, however, up until the point the legitimate reason would have been discovered. Since the employee would have remained employed up to that time but for the discrimination, a denial of back pay covering this period of time would leave the plaintiff worse off than if discrimination had not occurred. See *Wallace*, 968 F.2d at 1182.

Although an employer may well find it difficult to prove when evidence of employee misconduct would have been discovered absent the plaintiff's suit, employers seeking to limit backpay liability are often called upon to prove what would have happened to a worker had the employer not

discriminated. See, *e.g.*, *International Bhd. of Teamsters* v. *United States*, 431 U.S. at 324, 359, 362 (1977); *Gibson*, 695 F.2d at 1009. Where the employee's misconduct was particularly egregious or detrimental to the employer, a court may conclude that it would have been discovered in short order. Regardless of the difficulty of proof, however, "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946).[17] And the nature of an employee's misconduct, even if particularly egregious, does not justify a departure from the make-whole principle of relief. As this Court has previously observed, even workers who have committed "a serious criminal offense against their employer" are entitled to the full protection of the fair employment laws. *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 281 (1976). See also *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 803-04 (1973).[18]

B. Reinstatement and Front Pay. Normally an order of reinstatement is required to make the prevailing plaintiff whole. See *Franks*, 424 U.S. at 779; *Taylor* v. *Teletype Corp.*, 648 F.2d 1129, 1138 (8th Cir. 1981); *Duke* v. *Uniroyal Inc.*, 928 F.2d 1413, 1423 (4th Cir. 1991). Unlike

---

[17] For these reasons we disagree with the EEOC's position that backpay should terminate on the date the misconduct was actually discovered, for that position may leave a worker worse off as a result of discrimination.

[18] The Tenth Circuit in *Summers* hypothesized the situation in which, during the course of fair employment litigation, one purporting to be a doctor is unmasked as a fake. To our knowledge no case has presented such an extreme situation, but should such an unlikely case ever arise a court of equity may deal with it appropriately without violating the deterrent and make-whole purposes of the fair employment laws. *Cf. Albemarle Paper*, 422 U.S. at 424 (in particular cases which have been litigated in an unusual manner, backpay can be denied without implicating the purposes of backpay relief).

backpay, however, which "squares accounts of what may be a closed relationship," "[o]rders for reinstatement and hiring are of on-going consequence to both employee and employer and [thus] involve more than making a victim of discrimination whole for past injuries." *Rodriguez*, 569 F.2d at 1242 n.21. Accordingly, most courts have recognized that "notwithstanding the desirability of reinstatement, intervening historical circumstances can make it impossible or inappropriate." *Duke* v. *Uniroyal Inc.*, 928 F.2d at 1423. See also, *e.g.*, *Houghton* v. *McDonnell Douglas Corp.*, 627 F.2d 858 (8th Cir. 1980) (denying reinstatement because plaintiff was no longer physically fit for the position); *Ginsberg* v. *Burlington Indus., Inc.*, 500 F. Supp. 696, 699 (S.D.N.Y. 1980) (appropriate to deny reinstatement where facts demonstrate a "'lack of complete trust and confidence between plaintiff and defendant'").

The discovery of after-acquired evidence is an "intervening historical circumstance" that may make reinstatement inappropriate. First, if the employer proves that, even absent the discriminatory dismissal and ensuing litigation, it would have discovered the after-acquired evidence in short order and dismissed the plaintiff, reinstatement would in effect make the plaintiff better off than if no discrimination had occurred. Second, even without such proof, the discovery itself may nevertheless so damage the employment relationship that reinstatement would be unworkable. *McKnight* v. *General Motors Corp.*, 908 F.2d 101, 115 (7th Cir. 1990). In the latter case, however, an award of front pay might be appropriate to compensate for the lack of reinstatement. See *Duke* v. *Uniroyal Inc.*, 928 F.2d at 1423; *Carter* v. *Sedgwick County, Kan.*, 929 F.2d 1501, 1505 (10th Cir. 1991); *Floca* v. *Homcare Health Servs., Inc.*, 845 F.2d 108, 112 (5th Cir. 1988); *cf. Burke*, 112 S. Ct. at 1873 & n.9.

C. Compensatory Damages. Under the Civil Rights Act of 1991, prevailing plaintiffs in disparate treatment cases are entitled to compensatory damages for pain and suffering caused by employment discrimination. 42 U.S.C. § 1981a. This Court has never determined whether such damages are available under the ADEA, a question on which *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. ___, 112 S. Ct. 1028 (1992), may bear heavily. But the Court need not decide that issue to hold that after-acquired evidence should have no effect on the availability of compensatory damages where, as here, they are sought as a remedy for age-based harassment. The harms inflicted by discriminatory harassment are well-documented in the prior decisions of this Court. See *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57 (1986); *Harris* v. *Forklift Sys., Inc.*, ___ U.S. ___, 114 S. Ct. 367 (1993). These harms are not diminished simply because an employer can show that it would have fired (or would not have hired) the victim had it known something of which it was unaware. *Cf. Still, supra*. Where, however, compensatory damages are sought to offset harm resulting from unemployment, then, like backpay, they should not be awarded beyond the point at which the plaintiff would have been dismissed for legitimate reasons. See EEOC Revised Enforcement Guide, *supra*, at 405:6926 (after-acquired evidence may cut off compensatory damages covering losses arising after discovery of misconduct).

D. Liquidated Damages. Punitive damages are available under Title VII as amended by the Civil Rights Act of 1991 if the employer acts "with malice or with reckless indifference" to the employee's rights, 42 U.S.C. § 1981a, and under the ADEA in the form of liquidated or double damages if the employer's violation was "willful," 29 U.S.C. § 626(b). See *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 125 (1985) (Congress intended ADEA's liquidated damages to be punitive in nature). A violation is "willful" if the employer "'knew or showed reckless disregard for the

matter of whether its conduct was prohibited by the ADEA.'" Id. at 128 (citation omitted).

After-acquired evidence should have no effect on the availability of liquidated or punitive damages under the fair employment laws. See EEOC Revised Enforcement Guide, supra, at 405:6927. Those remedies are awarded depending on the employer's understanding of the lawfulness of its own conduct; information the employer did not acquire until after it acted can have no bearing on that issue. Moreover, because punitive damages are meant to deter rather than compensate, the employer's conduct, not the employee's, is the only relevant consideration.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Michael A. Cooper
Co-Chair
Norman Redlich, Trustee
Barbara J. Arnwine
Thomas J. Henderson
Richard T. Seymour
Sharon R. Vinick
Lawyers' Committee For
Civil Rights Under Law
1450 G Street, N.W.
Washington, D.C. 20005
(202) 662-8600

Cathy Ventrell-Monsees
American Association of
Retired Persons
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-2060

William F. Sheehan
(Counsel of record)
William D. Weinreb
Amy Horton
Shea & Gardner
1800 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 828-2000

Steven R. Shapiro
Helen Hershkoff
Sara L. Mandelbaum
American Civil Liberties
Union Foundation
132 West 43 Street
New York, N.Y. 10026
(212) 944-9800

Counsel for Amici Curiae